

Appeal from a decision of the Salem District Office, Bureau of Land Management, cancelling a Private Maintenance and Care Agreement for a wild horse. OR 4710-9.

Affirmed.

1. Evidence: Sufficiency -- Wild Free-Roaming Horses and Burros Act

The Bureau of Land Management may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

APPEARANCES: Ronald L. Marek, Esq., Corvallis, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Esther E. Lenox has appealed from a decision of the Salem District Office, Bureau of Land Management (BLM), dated June 13, 1986, cancelling her Private Maintenance and Care Agreement (Agreement) with BLM for a wild horse (a mare), then 2 years old with Freeze Mark No. 8400 2649.

In a letter dated April 21, 1986, Dr. Loren H. Appell of the Veterinary Teaching Hospital, Oregon State University, filed the following report with the Benton County Sheriff's Department, concerning the condition of horses in Lenox's care:

This letter is in regards to the trip we made to Happy Hills Ranch on April 16, 1986. The owners of this property were present at the time of our examination of their animals. They reported to us that they own 16 horses of mixed breeds.

I had the opportunity to examine carefully several of these horses, overall inspecting approximately 12 of them. Every horse on this place has severe feet problems. They are in all degrees of laminitis at this time. [1/] Many of them have acute laminitis with severe pain and discomfort. Several animals are down and unable to rise and have ulcers on their bodies from laying on the ground. Others are able to move around but do so with great difficulty.

These animals have suffered from very severe neglect that is one of the worse cases of animal neglect I have ever observed. Some of the horses probably should be euthanized while others might have a chance to recover normal ambulatory abilities; however, they will be subject to recurrences of this condition. To salvage these animals is going to require continuous frequent foot care by a farrier plus professional care by a veterinarian. It will be quite expensive in the long run to salvage these animals.

The owners, while somewhat knowledgeable of the disease process, are extremely opinionated and will be very difficult to work with. Their financial ability to care for these animals is also highly questionable.

This problem has been going on for a long time as evidenced by the condition of the animals and I believe the appropriate Humane Society people need to be involved. Please contact me with any question you may have. [Emphasis added.]

On May 6, 1986, Benton County Sheriff's officers removed the adopted mare and 15 other horses from Lenox's property due to alleged poor care. Some horses were in such bad condition that they were destroyed. In police reports, dated May 14 and 15, 1986, Benton County Officer Shannon L. Bright recounted interviews with Dr. Marianne MacKay of the Pioneer Veterinary Clinic, and Dr. Alan Terrell of the Ark Animal Hospital, both of whom had provided care for horses at appellant's ranch. Officer Bright reported that Dr. Terrell told her that "the neglect arises from over concern and the belief that all pertinent helping professionals (veterinarians and farriers) are motivated by the dollar and not by any actual concern for the animals" (May 15, 1986, Report). Both Dr. Terrell and Dr. MacKay described laminitis and feeding problems with horses in appellant's care.

Over 3 weeks after the seizure, a BLM official inspected the mare, apparently for the first time. He stated that the mare was obese, but in better condition than the other horses due to her young age and relatively

1/ Laminitis is defined in Webster's Third New International Dictionary 1267 (1971), as: "inflammation of a lamina esp. of a horse's foot that is accompanied by heat, pain, and lameness and is caused by overexertion on hard footing or more often is secondary to some other condition (as digestive disturbances due to overeating)."

short time in appellant's care. 2/ He recommended formal removal of the horse from Lenox. Thereafter, BLM issued the decision on appeal. BLM stated that the adopted mare had been grossly misfed and suffered from a lack of judicious care. BLM cancelled the Agreement for failure to abide by its terms and officially notified appellant that it was taking possession of the adopted mare from the Benton County Sheriff's Department. BLM cited 43 CFR 4740.4-2(e) as authority for the repossession. 3/

Benton County brought criminal charges against appellant, alleging neglect and abuse of the seized animals. Following a trial, the charges were dismissed apparently because the State failed to prove its case.

On appeal, appellant asserts that she properly fed and cared for the adopted mare and that the mare was healthy when BLM repossessed it. She insists that she abided by the terms of the agreement. Although she offers explanations for her veterinary problems with other horses, she claims the condition of the other horses in her care cannot be used to justify repossession of a healthy horse. She states that veterinary experts who testified at the criminal trial were unable to establish that her horses' laminitis problems were caused by improper feeding. She also points out that following dismissal of the criminal charges her horses were restored to her possession, except for the adopted mare and the horses which were euthanized.

[1] The Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1982), authorizes the Secretary of the Interior

2/ When, following the filing of the appeal, BLM forwarded the case file to the Board, it included the statement of BLM employee Raymond E. Naddy, of the Salem District Office, dated Oct. 31, 1986, detailing the history of the seizure of appellant's horses, including the adopted horse, by the Benton County Sheriff's Office. The statement supported the decision of the District Manager to cancel the Agreement. There was no evidence in the record that the statement was ever served on Lenox or her attorney. In accordance with 43 CFR 4.27(b)(1), this Board provided appellant with a copy of the statement and allowed her the opportunity to respond.

3/ BLM's citation of 43 CFR 4740.4-2(e) was to a regulation in effect in 1982, which provided:

"If the authorized officer determines that the adopted wild free-roaming horse or burro is being commercially exploited, inhumanely treated, or treated in a manner that violates a provision of the cooperative agreement, he may take immediate possession of the animal."

In March 1983 that regulation was redesignated 43 CFR 4740.4-3(e), but the language quoted above remained the same. 48 FR 9262 (Mar. 4, 1983). However, prior to BLM's repossession of the mare, the regulations were revised and the language relied on by BLM was removed from those regulations. (51 FR 7414 (Mar. 3, 1986)). The regulation applicable at the time of repossession, and presently in effect, 43 CFR 4770.2(b), provides:

"An adopter's failure to comply with the terms and conditions of the Private Maintenance and Care Agreement may result in the cancellation of the agreement, repossession of the wild horses and burros included in the agreement and disapproval of requests by the adopter for additional excess wild horses and burros."

to place wild horses with qualified applicants who can assure humane treatment and care. See 43 CFR Subpart 4750. Title to horses placed in private care remains with the Government for a minimum of 1 year after placement and execution of the Private Care and Maintenance Agreement and until BLM issues a Certificate of Title. 16 U.S.C. § 1333(c) (1982); 43 CFR 4750.4 and 5.

When BLM cancelled the Agreement, the regulations prohibited:

(a) Maliciously or negligently injuring or harassing a wild horse or burro;

* * * * *

(f) Treating a wild horse or burro inhumanely;

(g) Violating a term or condition of the Private Maintenance and Care Agreement.

43 CFR 4770.1.

In addition, 43 CFR 4760.1(a) requires that the adopter must comply with the agreement and the regulations. The standard agreement (form 4710-9 page 2) specifically prohibits: "Treating a wild horse or burro inhumanely." Failure to comply with the terms of the agreement may result in its cancellation, repossession of the horse subject to it, and disapproval of subsequent requests to adopt additional wild horses or burros. 43 CFR 4770.2(b). Alternatively, if BLM determines that an animal is not receiving proper care or is not maintained in satisfactory condition, BLM may require specific corrective actions as a condition for continuation of an agreement. 43 CFR 4760.1(d).

The question presented by the appeal is whether BLM properly cancelled the Agreement and repossessed the mare under the circumstances of this case.

The Benton County Sheriff's office seized the mare and 15 other horses apparently on the basis of Dr. Appell's report. BLM independently examined the mare and determined that although it was in better condition than appellant's other horses, it still suffered from overfeeding. In addition, Dr. Appell stated in his report that he inspected 12 of appellant's horses in April 1986 and at that time all the horses on appellant's ranch had severe foot problems. Appellant denies that the mare was overfed or improperly cared for in any way. She also denies that the mare had any foot problems of any type, although she admits the mare was, in fact, inspected by Dr. Appell.

Appellant has provided no independent evidence to support her claim regarding the condition of the mare at the time BLM took possession. ^{4/} The

^{4/} As we indicated in Mary Magera, 101 IBLA 116, 119 (1988), when BLM cancels an agreement and repossesses a wild horse, the adopter has the burden of establishing that such action was improper.

fact that criminal charges against appellant were subsequently dismissed does not necessarily mean that BLM's action was improper. 5/ The regulations at 43 CFR 4760.1(a) provide that the adopter shall comply with the Private Care and Maintenance Agreement and the regulations in 43 CFR Subpart 4760. Both the regulations and the Agreement state that inhumanely treating a wild horse is a prohibited act. The regulations define inhumane treatment as "any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community." 43 CFR 4700.0-5(f). The record supports a finding that the wild horse assigned to appellant was inhumanely treated. 6/ That fact alone reasonably justified BLM's action. See Mary Magera, 101 IBLA 116, 119 (1988). 7/ However, the Board has indicated that the condition of other horses in an adopter's care may affect the status of a Private Maintenance and Care Agreement. Thus, in Susan A. Moll, 101 IBLA 45, 50-51 (1988), we affirmed the cancellation of an agreement and repossession of a healthy horse where an adopter breached the agreement in the treatment of another horse subject to the same agreement. Moreover, we acknowledged the possibility of the cancellation of an agreement if there exists sufficient evidence of mistreatment of animals under a separate agreement. Patrick E. Hammond, 60 IBLA 205, 208 n.4 (1981). 8/

5/ Naddy explained in his Oct. 31, 1986, statement that the criminal charges had been brought under a statute effective September 1985 which specifically defined animal abuse and animal neglect leading to serious physical injury, and that appellant's position at the trial was that the State was required to show that she was responsible for serious physical injury to the animals between September 1985 and the date the animals were seized in May 1986. He then stated:

"The majority of the animals involved had been in the possession of the defendants from 6 to 15 years, and all experts agreed that the disease (laminitis) was a chronic disease of longstanding and, while progressive, there was no way of identifying that part of the disease which had developed or progressed during the eight-month period beginning with the passage of the new statute." (Naddy Statement at 2).

6/ We do not mean to imply that appellant was deliberately cruel to her horses. Inhumane treatment may be just as much the result of ignorance and/or neglect as design. Kathryn E. Spring, 82 IBLA 26, 30 (1984).

7/ Under 43 CFR 4760.1(d), BLM could have required specific corrective actions as a condition for continuation of the Agreement, rather than cancelling the Agreement and repossessing the horse. Whether to proceed under that alternative, however, was within BLM's discretion. We cannot say that its determination to cancel and repossess was improper under the circumstances.

8/ Given our finding in this case regarding the condition of the mare and our conclusion that BLM acted properly in cancelling the agreement and taking possession of the horse, we need not address the question of whether the evidence of the condition of appellant's other horses not covered by any agreement with BLM could independently serve as the basis for cancellation and repossession of a horse covered by an agreement.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Salem District Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member